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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 69

AMERICAN STEVEDORES, INC.,

Petitioner,

v.

ROSARIO PORELLO and UNITED STATES OF AMERICA,

Respondents.

REPLY BRIEF OF PETITIONER TO BRIEFS OF ROSARIO PORELLO AND UNITED STATES OF AMERICA

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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The petitioner herein, American Stevedores, Inc., would be remiss in its duties to this Court were it to leave unanswered the briefs of both respondents.

In discharge of such duty, the petitioner herein replies.

As to Porello's brief:

Pp. 1, 2, 9, 21: There is interspersed throughout Porello's brief the statement that the United States of America has not appealed to this Court from the decree holding the United States of America liable under the Public Vessels Act. What weight this contention can possibly have defies the petitioner's appreciation. It is fundamental and familiar learning that the question of jurisdiction is always before the Court. It cannot be consented to by the parties and cannot be conferred by them. In fact, many courts have stated that the question of jurisdiction must be raised by the Court *sua sponte*.

In the case at bar, the respondent, United States of America filed exceptions (R. 5) and exceptive allegations (R. 6) to the original libel instituted under the Suits in Admiralty Act (R. 2). After the order was signed overruling the exceptions (R. 8), Porello, *of his own volition*, filed an amended libel alleging a cause of action under the Public Vessels Act (R. 9). For a detailed discussion of the initial pleadings, see page 6 of petitioner's main brief. After the decree holding the United States of America initially liable (R. 72), said respondent appealed to the Circuit Court of Appeals, 2nd Circuit, and assigned as Errors No. 1 and No. 2 the failure to dismiss the libel for lack of jurisdiction under the Public Vessels Act (R. 73).

When *United States of America* v. *Lauro* (No. 514, transferred to the summary docket and assigned for argument immediately following the case at bar, 1946 A. M. C. 1496), was before District Judge Abruzzo, *sub. nom. Lauro* v. *United States*, 63 F. Supp. 538, the Government contended as follows (p. 539):

> "The respondent claims the word 'damages' in this section means only damage to property and not damage to person."

When the *Lauro* case was appealed by the Government to the Circuit Court of Appeals, the very same contention was briefed and argued. In fact, in the question certified by the Circuit Court of Appeals, 2nd Circuit, on September 11, 1946, the following is found (p. 417 of 157 F. 2d):

> "On this appeal, the respondent-appellant, contended that the said Public Vessels Act of 1925 provided a *remedy against the United States for damage to property only, but not for damage to a person or damage arising by reason of the death of a human being.*" (Italics supplied.)

In fact, although the Government does not indicate in its memorandum in this Court in the *Lauro* case (No. 514), the question certified to this Court in said case was upon oral motion of Government's counsel.

Further, the Government has very recently urged the same defense, to wit, no coverage for personal injuries under the Public Vessels Act, in a case tried, but yet undetermined, before District Judge Knox, of the Southern District of New York, in *Vacante* v. *U. S. A.* and *Marra Bros. Inc.*, Admiralty 140-169.

As a complete answer to Porello's solicitations, that the United States of America did not appeal to this Court in the case at bar, there can be but two possible answers. Either the Government was content not to urge further the jurisdictional question of the Public Vessels Act by virtue of the fact that it had been indemnified wholly under the "Warshipsteve" contract, as interpreted by the Circuit Court of Appeals, 2nd Circuit, or the attorneys representing the United States of America inadvertently failed to timely petition this Court for a writ of certiorari. This petitioner is in no position to answer for the Government's actions save to indicate the foregoing as dispositive of the entreaties of Porello.

Pp. 2 and 9: At this point of the case at bar, it seems in rather poor taste for Porello to vacillate as to the character of the vessel involved and to attempt to seek refuge in the unrequited hope that perhaps the "Thomas Stone" was a merchant vessel. At page 2 of Porello's brief, it is stated "while stowing *general* cargo * * *" (italics supplied). By referring to R. 120, which is page 86 as stamped, cited by Porello in support of said statement, it will be seen that nowhere is the cargo described as *general* cargo. Again, in Porello's brief at page 9, 2nd paragraph from the bottom of the page, the statement is made that the vessel was not a war vessel etc. In view of the pleadings (see page 3 of petitioner's main brief) and in view of the proof adduced by the

parties (see page 6 of petitioner's main brief—also Government's Exhibit M (R. 66) as showing the cargo involved) the weakness of Porello's position is patent.

Pp. 4, 5, 6, 7, 8, 9, 22: At page 4 Porello seeks solace in the language of Senator Bayard, as covering personal injury claims. He dismisses without any consideration the statement of the sponsor and draftsman of the Public Vessels Act, Mr. Underhill, that the bill only covered *property* damage (see page 14 of petitioner's main brief). Mr. Underhill, in January, 1928, as sponsor of H.R. 9285, which was 3 years after the Public Vessels Act, stated once again, when asked about the Public Vessels Act, that the Public Vessels Act, which he fathered, was for *property damage only* (see pages 20 and 21 of petitioner's main brief). Porello indicates at pages 4 and 7 of his brief that only after the restriction limiting causes of action to property damage resulting from collision was stricken out was the Public Vessels Act enacted. As petitioner has indicated at page 17 of its main brief, *collision causing damage* was only removed but the same left undisturbed the term damages, which meant only *property damage*. The phrase "*property damage*", referred to on page 4 of the brief of Porello, as having been removed before Congress gave favorable consideration to the bill, *never was in the draft of any bill respecting public vessels.* Collision as a *cause* was removed so as to embrace those *causative* factors as are set forth at page 17 of petitioner's main brief.

Further, if, as is contended for at pages 7 and 8 of Porello's brief, the *Suits in Admiralty Act* and the *Public Vessels Act* must be read together, then Congress' attempt in 1924 to enact H.R. 9075 (see page 16 of petitioner's main brief), which would have amended the Suits in Admiralty Act so that it would be applicable to public as well as merchant vessels, was an idle gesture. We don't think Congress embarks upon such a course of conduct.

In an abortive effort to explain away the Special Acts for the *Relief of Edna M. Callahan, Anna Scott, Margaret Grace and Alice Shriner* (see pages 22 and 23 of petitioner's main brief), Porello at pages 4 and 5 of his brief makes some interesting statements. He argues that the passage of these Special Acts "does not indicate that these people could not have maintained actions against the government". In support of that statement, which we respectfully submit is completely erroneous, there is cited a letter of Claude A. Swanson. That letter will be searched in vain *for even a subtle suggestion* that these claimants could maintain actions against the government. Claude A. Swanson's letter is found at pages 2 and 3 of H. Report 33, 75th Congress, 1st Session. On page 2, Secretary Swanson sets forth the facts of the accident as found by the investigation conducted by a board of the Navy Department whose opinion it was that the explosion in question was due to the material used and to the negligence of the Navy personnel. At page 3 of H. Report 33, Secretary Swanson sets forth the injuries as found by Lt. Commander Dearing of the Medical Corps. Secretary Swanson concludes only as follows:

> "* * * no recommendation can be made as to what constitutes reasonable compensation in each case. However, the amount provided in bill H.R. 6129 appear to be very excessive."

To show the complete fallacy of Porello's argument, we respectfully direct this Court's attention to H. Report 322, 75th Congress, 1st Session (see page 22 of petitioner's main brief), which report covered 2 of the aforementioned claimants. As part of said Report, a letter from N. H. Standley, Acting Secretary of the Navy, is appended and forms pages 2 and 3 of H. Report 322. In said letter, Secretary Standley states (page 3 of H. Report 322):

> "Under date of Dec. 3, 1932, an inquiry was submitted to the Navy Department by Birney Donnell,

Esq., attorney at law, Los Angeles, Calif., on behalf of Miss Grace, concerning the submission of a claim for the injuries sustained. In his communication, Mr. Donnell stated that Miss Grace's injuries consisted of second and third-degree burns and that she had incurred expenses for physicians, nurses and medicines. *In reply to this communication the Navy Department stated that there was no authority of law whereby the Navy Department could adjust claims for personal injuries.*" (Italics supplied.)

This letter is dated February 9, 1934. As the petitioner indicated at page 24 of its main brief, it wasn't until December 28, 1945 that the Secretary of Navy was given limited authority to adjust claims (31 U. S. C. A. § 223d).

Further, Rule 15 of the Rules of the House Committee on Claims would have precluded said Committee from consideration of these claims, which eventuated in Special Acts, if any other method of obtaining redress were available (see page 23 of petitioner's main brief).

In order to destroy completely any further argument that might be advanced by Porello, we take this opportunity of indicating to this Court that *no appropriations by way of Special Acts are necessary when a department of the Government settles a claim or pays a judgment entered upon any decree.* The statement at page 5 of Porello's brief, 1st full paragraph thereof, is entirely untrue.

The appeal that is made to this Court by Porello that it would be unconscionable to think that Congress intended to deprive personal injury claimants of any relief is answered eloquently by the remarks of the sponsor of the Public Vessels Act, Mr. Underhill, found at pages 14 and 21 of petitioner's main brief.

However much an appeal can be made to sympathy, it must always be borne in mind that the sovereign is in-

volved and that immunity from suit is waived in very few instances. The need for reform has been appreciated although the absence of remedy has been simultaneously recognized: *Holtzoff, Tort Claims against the United States* (1941); 4 Fed. B. A. J. 163; 25 A. B. A. J. 828 (1939); *Kleplinger, Hints on Suing Uncle Sam* (May 1943), 47 (No. 2) Law Notes 25. It wasn't until August 2, 1946 by the Federal Tort Claims Act that relief and remedy was afforded (see page 24 of petitioner's main brief).

Porello has attempted, at page 8 of his brief, to indicate that an inference can be drawn from this Court's discussion of the *Dobson* and *O'Neal* cases in the *Canadian Aviator Ltd.* case that if the two suitors had not been members of the personnel of the vessels the action could have been maintained under the Public Vessels Act. In such contention, Porello has overlooked completely what the Circuit Court of Appeals said in the *Dobson* case (p. 808 of 27 F. 2d):

> "Appellee, on the other hand, argues that the statute should be construed as limiting recovery to damages to property and not contemplating compensation for loss of life. *We do not find it necessary to determine this question in the present case.*" (Italics supplied.)

It is the petitioner's position that not only did this Court not decide in the *Canadian Aviator* case the question presented on this appeal but that it inferentially, by denial of certiorari in the *Dobson* case, 278 U. S. 653, No. 556, approved of the reasoning of the Circuit Court of Appeals, which, as we indicated above, left the question now presented unanswered. This is in line with Mr. Justice Frankfurter's statement in his concurring opinion in *Republic of Mexico* v. *Hoffman*, 324 U. S. 37, 39, that

> "Adjudication should not borrow trouble by worrying about a case not calling for decision."

The Wright cited by Porello, at page 9 of his brief, is clearly inapposite to the instant question. As a reading of said case will show, it was a *collision* case and the question disposed of was the question of interest prior to a decree fixing the liability of the two vessels.

P. 10: Porello has cited *Grasso* v. *Lorentzen*, which has been distinguished by petitioner at page 33 of its main brief on the basis that the pleadings and decision will show that the question there involved was *assignment* and not *election*. *The Etna*, cited by Porello at page 10 of his brief, does not cover the situation here presented. In the last cited case, the only question the Circuit Court of Appeals, 3rd Circuit, decided was the equitable right of the employer to intervene in a suit instituted by its employee against a shipowner in order to impress a lien upon and recover against a fund which had been deposited in the registry of the Admiralty Court. This fund represented the amount the employer had paid to the employee-libellant for compensation and medical expenses under the Longshore Act and said fund had been created, pursuant to agreement of counsel for all parties (p. 39 of 138 F. (2d)—1st column), by an amount of money ($3,908.28) having been deducted from a $12,000 recovery against the shipowner by the injured longshoreman. This separation of funds was to enable the Court to determine the employer's claim to equitable subrogation. Further, the Court there, agreeing with the petitioner's contention as found at page 35 of its main brief, respecting the misconception of compensation payments as voluntary, said (p. 40 of 138 F. 2d):

> "No reasonable basis is present, therefore, for considering the employer's payments either as gratuitous or as voluntary, as the appellant would have us do."

Pp. 11 and 23: Porello argues that, since *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, allowed a federal em-

ployee to sue a third party so long as he has not accepted compensation under an award, the same principle should apply to a longshoreman. Of course, he misconceives the theme, purpose and application of the U. S. Employees Compensation Act, 5 U. S. C. A., § 751 et seq., as contrasted with that of the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. A., § 901 et seq.

The two acts are not comparable at all. In the U. S. Employees Compensation Act, there is no provision for *election as to a third party* as is contained in the Longshore Act (33 U. S. C. A., § 933(a)). The only question of election in the U. S. Employees Compensation Act is as to the remedy the employee wishes to pursue *as against his employer*. In this connection, see *Militano* v. *United States*, 156 F. (2d) 599 (C. C. A. 2—1946) in comparison with *United States* v. *Marine*, 155 F. (2d) 456 (C. C. A. 4—1946). It is patent that comparison and similarity between the two Acts ceases at the very threshold of inquiry.

P. 21: The mere statement by Porello in paragraphs 2 and 3 at page 21 that the same insurance company, which insures the ship, insures the employer-stevedore is a classical example of *reductio ad absurdum*. Would there be any common sense to a ship, insured by one insurer, impleading a stevedore, insured by the same insurer? Would the petitioner herein have been impleaded in this suit if it were insured by the same insurer which insured the ship? It would be a situation of an insurer taking money out of its left pocket and putting the same in its right pocket. Resort need only be had to the many recent cases decided under *General Admiralty Rule 56* and *Federal Civil Rule 14*, as found in the annotations to those rules in *28 U. S. C. A., § 723*, to realize the folly of such a statement.

Further, Porello asserts at page 21 that an employer-stevedore does not bring actions against the ship for the

benefit of his employee. We respectfully refer this Court to *United States Fidelity & Guaranty Company for the Use of Itself and of Walsh* v. *United States*, 56 F. Supp. 452. The Circuit Court of Appeals, 2nd Circuit, affirmed the District Court in 152 F. (2d) 46, and held the right of subrogation to the cause of action against a third party to be vested in the compensation carrier as an incident to its contract of insurance (See 2nd column of p. 48 of 152 F. (2d)). The suit in the cited case was to recover full indemnity for Walsh's injuries (See p. 47 of 152 F. (2d)—2nd column).

It is respectfully submitted that nothing has been set forth in the brief of Porello which either detracts from or makes any inroads upon the contentions of this petitioner as set forth in its main brief.

As to the brief of the United States of America:

Pp. 11-17 inc.: The Government commendably states, page 16 of its brief, that

> "Never at any time in the course of the debates in the House or Senate was it expressly stated that the bill extended to suits for personal injuries. Many statements in the course of the debates, some of which are cited in petitioner's brief, seem to indicate that only relief for property damage was intended. *We accordingly submit that, if decisive weight is to be given to the legislative history, it would appear that the Public Vessels Act was not intended to cover suits for personal injury.*" (Italics supplied.)

The Government, seemingly, thinks that an anomalous situation exists today, in that a person sustaining personal injuries caused by a public vessel would have to resort to suit under the Federal Tort Claims Act, whereas the property damage claimant could sue under the Public Vessels Act. If such an anomaly exists, it exists only in theory.

It is not found in the courtroom today. Let us see how such a dual case against the Government as owner of a public vessel would be handled today. For the hull damage caused to a private vessel by a public vessel, the owners of the former would sue under the Public Vessels Act on the admiralty side of the District Court, which would try the case without a jury. The personal injury claimants would sue in the same court under the Federal Tort Claims Act, Title IV of the Legislative Reorganization Act of 1946, Public Law 601, Chapter 753 of the Laws of the 79th Congress, 2nd Session. This action for personal injuries, as the admiralty action for property damage, would be triable without a jury (Sec. 410(a) of Part 3 of Federal Tort Claims Act). The same Court, without a jury, would determine the substantive rights of the parties to both actions.

If, indeed, an anomaly exists, which the petitioner herein denies, the anomaly was created by Congress, when it attempted to cure a defective situation, which it appreciated existed. Subsequent to the Public Vessels Act and prior to the Federal Tort Claims Act, Congress passed Special Acts to care for maritime torts of the personal injury type. (See page 5 hereof and footnote 11 of Government's brief). Congress appreciated that it was poorly equipped to handle these claims, along with others, through the medium of Special Acts which emanated from and burdened various Committees (Senate Report No. 1400, 79th Congress, 2nd Session, page 7, under caption "Saving Congressmen's Time"). The aforementioned Senate Report was submitted to the Senate on May 31, 1946 by the Special Committee of Reorganization of Congress (92 Cong. Rec. 6015—unbound advance sheet for May 31, 1946) to which committee Senate bill 2177 (Legislative Reorganization Act) had been referred upon its introduction on May 13, 1946 by Mr. La Follette (92 Cong. Rec. 498—unbound advance sheet for May 13, 1946).

The contemplated reorganization of Congress and its Committees was to do away in great part with Special Committees. At page 3 of S. Report 1400, *supra*, a table of the existing Special Committees and the contemplated reorganized Committees appears. The Committee on Claims was to be abolished. With the abolishment of the Committee on Claims, there would be eliminated a source of redress to which maritime tort claimants, along with others, had formerly resorted, discussed *supra*. The Legislative Reorganization Act abolished private bills, resolutions and amendments authorizing or directing the payment of money for property damage and for personal injuries (Cf. page 18 of S. Rep. No. 1400, *supra*; Sec. 131 Part 3 of Title I of Legislative Reorganization Act). In place of the time-honored device of the passage of private acts, the Federal Tort Claims Act was conceived and provides a method for the administrative and judicial adjustment of tort claims against the United States.

Thus, Congress, desirous of divorcing itself from the burden of enacting Special Acts to compensate personal injury claimants, including maritime tort claimants, enacted the Federal Tort Claims Act on August 2, 1946 (92 Cong. Rec. A 5251—unbound advance sheet for August 12, 1946). We think the foregoing answers the Government's fear of an existing anomaly.

The expression of the Government, heretofore set forth, in agreeing with the petitioner that the legislative history negatives coverage under the Public Vessels Act of personal injury claims, serves as an answer to Porello as to the Government's views upon the jurisdictional question presented.

Pp. 17-21 inc.; In limine, the Government states at page 17 that it has never joined in the petitioner's objection to jurisdiction based upon the provisions of the Longshore Act. We respectfully refer Court and counsel to Error 4 (R. 73) in the Government's Assignments of Error to the

Circuit Court of Appeals, 2nd Circuit, which reads as follows:

> "4. In ordering stricken from the answer of this respondent, the allegations with respect to the effect of the Longshoremen's and Harbor Worker's Compensation Act."

It would, therefore, appear that on appeal the Government assumed that it had raised in its answer the very defense which this petitioner raised in its answer (R. 16, 17) and as Error 1 in its Assignment of Error (R. 83). Its answer (R. 11) inadvertently did not raise the aforementioned defense.

In answer to the contention of the Government respecting the "suspension" of third party rights, we respectfully refer this Court to the statement of the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corp.*, found at pages 30 and 31 of petitioner's main brief.

Pp. 21-36 inc.: The United States reiterates the facts herein at pages 21 to 27 of its brief. The petitioner herein does not refute those facts. However, *upon these very facts*, the Circuit Court of Appeals said (R. 86, 87; 153 F. (2d) 607):

> "The District Judge found that the failure to have a lock on the strongback was negligent. *The evidence supports this finding.*" (Italics supplied.)

The Circuit Court of Appeals further said (R. 88; 153 F. (2d) 607):

> "In our opinion, the absence of the lock operated concurrently in producing the result."

In the face of these findings and holdings, which under the authorities are to be upheld unless clearly erroneous, the United States breached, at the very outset, its non-

delegable duty to furnish business invitees a safe place. *La Guerra* v. *Brasileiro*, 124 F. (2d) 553, cert. denied 315 U. S. 824; *Beadle* v. *Spencer*, 298 U. S. 124; *Grasso* v. *Lorenzen*, 149 F. (2d) 127, cert. denied 326 U. S. 743.

This Court recently held the warranty of seaworthiness to be extended to longshoremen in *Seas Shipping Co.* v. *Sieracki*, 66 S. Ct. 872. It therein said (p. 877 of 66 S. Ct.):

> "Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. Mahnich v. Southern S. S. Co., supra; Atlantic Transport Co. of West Virginia v. Imbrovek, 234 U. S. 52, 34 S. Ct. 733, 58 L. Ed. 1208, 51 L. R. A., N. S., 1157; Carlisle Packing Co. v. Sandanger, supra. *It is a form of absolute duty owing to all within the range of its humanitarian policy.*" (Italics supplied.)

As was pointed out at page 41 of petitioner's main brief, the impleading petition (R. 14) alleged that the libelant's injuries were due "*solely* to the negligence, if any negligence be established, of American Stevedores Inc." It certainly was the understanding of the Government that the stevedore would be *responsible* where its negligence caused the injury complained of. In the instant case, the negligence of the United States and the petitioner concurred, *supra*. Responsibility for such a situation was not embraced in the understanding of the parties to the "Warshipsteve" contract.

Indeed, the Article of this "Warshipsteve" contract is nothing more than a *restatement of the law*, to wit, the stevedore will be liable for the injury it causes, not for the negligence of someone else. It is highly noteworthy that there is completely absent from this "Warshipsteve" contract the language of "indemnification and save harmless" found in the "Warshiprep" contract in use since 4/1/43. See *Compilation of Standard Contract Forms of the War Shipping Administration* (1945), p. 444 thereof.

At page 28, the Government states that stevedoring contracts *often* provide for indemnification of the shipowner by the stevedore and in support of that proposition, it cited in footnote 18 the *Kogusai* case, which we cited at page 40 of our main brief. There, *the contract provided that the stevedore indemnify the shipowner for damages "for which either or both of the parties hereto may or shall be liable"* (p. 404 of 23 F. Supp.—2nd column). No such provision is contained herein.

In footnote 20 the Government says petitioner's reference to the indemnity clause in the *Weldon* case, as being similar to that in the case at bar, is inaccurate. In the very same breath, it says "The clause there, while similar, etc. * * *".

At page 34, the Government says that the generally accepted principle that express language is necessary to embrace indemnification is the outmoded result of considerations of public policy in cases of common carriers. We simply refer the Government to cases at page 39 of petitioner's main brief as a complete answer to this incorrect premise.

Pp. 36-45 inc.: The Government discusses the common law theory of active and passive negligence. That rule has not been adopted in admiralty. The Government concedes this for it frankly states, page 45 of its brief, that it can find no admiralty decision to support its argument.

Pp. 45-50: The Government has treated the question of indemnity over under Rule 56 as an ancillary claim requiring no further jurisdictional prerequisites. The same is more clearly indicated in its footnote 31 at page 47 of its brief. It is to be noted that the cases cited and the rationale in support thereof is under the common law practice crystallized in *Federal Civil Rule 14.* There it has been held that, where a party is impleaded by virtue of a liability running to *the impleading party*, no independent

jurisdictional grounds are necessary and the impleaded claim is *ancillary* to the main proposition. Further, under *F. R. C. P. 14* at present writing, the original plaintiff can be tendered another defendant by way of impleader. (See contemplated change as expressed in the Report of Proposed Amendments prepared by the Advisory Committee on Rules for Civil Procedure, submitted to this Honorable Court on June 14, 1946—also, *Bull v. Santa Fe Trail Transp. Co.*, 6 F. R. D. 7.)

In contrast to this practice under the civil rules, it is to be noted that impleader in Admiralty is governed by *General Rule 56* which expressly provides that "such suit shall proceed as if such vessel or person had been originally proceeded against". As Porello, the employee of the petitioner herein could not proceed against the petitioner—his employer—directly, it became indispensable that separate and independent jurisdictional grounds in Admiralty support the impleading petition of the United States.

The decree appealed from, should be reversed with directions that a decree be entered dismissing the libel.

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.